IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-387

R. Trippett Boineau,

Petitioner,

vs.

Tarr Investments, a partnership; Sherbrook Associates, a partnership; and Leroy Strasburger, individually and as a partner of Tarr Investments and Sherbrook Associates; and Alvin Strasburger, individually and as a partner of Tarr Investments and Sherbrook Associates,

Respondents

and

R. Trippett Boineau,

Petitioner,

vs.

United States Trust Company of New York,

Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

The Petition before the Court involves three cases. Two of the cases (Calendar Numbers 1263 and 1315) are between the same parties and the allegations of the complaints in each are identical. The only difference between the two cases is that in one action (1263) the Petitioner appeared through counsel and in the other (1315), he appeared pro se from the beginning (Tr. 1). The complaint in the third case (Calendar Number 1424) names only United States Trust Company of New York as a defendant and is signed by the Petitioner pro se (Tr. 4).

The only issues raised by the Petition before the Court are addressed to the denial by the trial judge of the Petitioner's oral motions for a

continuance, for a voluntary non-suit and for a recess, when the cases were called for trial at a previously specified time by order (See Tr. 45-47 and Petition at 2).

STATEMENT OF FACTS

The proceedings relevant to the present cases began on July 12, 1977, when the Petitioner filed, pro se, a notice of lis pendens in a case which had been pending in the Court of Common Pleas for Richland County, South Carolina, entitled William H. Moore, Jr. versus Sherbrook Associates, et al, in which the Petitioner had been a named defendant (Tr. 187). Since the Moore suit had been previously dismissed with prejudice and since the notice of lis pendens was hampering the sale of certain real estate, the remaining defendants in that action (Tarr Investments,

Sherbrook Associates, Leroy Strasburger and Alvin Strasburger) moved to strike the notice of lis pendens (Tr. 70-71). Although notice of the hearing was given to the Petitioner, when the motion was heard before the Honorable John Grimball, Circuit Judge, on July 22, 1977, he did not appear (Tr. 70-71). After hearing testimony, Judge Grimball issued an order cancelling the Petitioner's notice of lis pendens in the Moore case (Tr. 132). A notice of intent to appeal the order was filed on July 28, 1977 signed by the Petitioner, pro se (Tr. 188).

Approximately four hours after the filing of Judge Grimball's order in the Moore case, Kermit S. King, Esquire, as attorney for the Petitioner, filed a

notice of lis pendens against property owned by the Respondent, Tarr Investments, and instituted the first action involved in the present Petition (No. 1263) (Tr. 1, 79 and 187). Subsequently, Mr. King withdrew as counsel for the Petitioner (Tr. 39). The Petitioner then filed, pro se, on July 27, 1977 an identical notice of lis pendens to that filed by Mr. King and served and filed an identical summons and complaint, also pro se, which is the second suit involved in the present Petition (No. 1315) (Tr. 1). The defendants (Respondents Tarr Investments, Sherbrook Associates, Leroy Strasburger and Alvin Strasburger) named in the suits moved to strike both notices of lis pendens and the

motion was set to be heard before Judge Grimball (Tr. 1).

A hearing was held before Judge Grimball on July 29, 1977 at which time the Petitioner appeared personally and was also represented (for the purpose of the hearing) by Walter W. Brooks, Esquire, and Frank L. Taylor, Jr., Esquire (Tr. 67). Judge Grimball took testimony offered by the opposing parties (Tr. 115-227).

Following the conclusion of the hearing, Judge Grimball orally rendered findings and conclusions, which were later incorporated in a written order dated August 8, 1977 (Tr. 2,28-32, A. 35-41). In the order, Judge Grimball found, inter alia, that the interests of all parties to the lawsuits would best be served by striking

the notices of lis pendens in both actions and he restrained the Petitioner from filing further notices of lis pendens against the property be sold to the Respondent, United States Trust Company of New York (Tr. 2, 28-32, A. 35-41). Although the Petitioner timely served and filed notice of his intention to appeal from Judge Grimball's order, the appeal was dismissed on January 6, 1978, by a consent order signed by the Petitioner pro se and also by his counsel (Tr. 42-43).

Subsequent to the hearing on July 29, 1977, and prior to the issuance of Judge Grimball's written order of August 8, 1977, the Petitioner brought a Petition for a Writ of Prohibition in the original jurisdiction of the South Carolina Supreme

Court seeking to restrain the enforcement and implementation of Judge Grimball's oral ruling of July 28, 1977 (Tr. 3). On August 3, 1977, Justice J. B. Ness entered a temporary Writ of Prohibition and ordered the Respondents (Tarr Investments, Sherbrook Associates, Leroy Strasburger and Alvin Strasburger) to show cause before Justice W. L. Rhodes, Jr. why the temporary Writ should not be continued (Tr. 3). The Petitioner personally and his counsel and counsel for the Respondents appeared before Justice Rhodes on August 5, 1977, to argue the merits of the Petition (Tr. 3). After having heard extensive argument from all parties, Justice Rhodes dismissed the temporary Writ of Prohibition by Order dated

August 5, 1977 (Tr. 27).

After the hearing before Justice Rhodes, Frank L. Taylor, Jr., Esquire, withdrew as counsel for the Petitioner as evidenced by a consent order issued by the Court (Tr. 41-42). The order, signed by the Petitioner personally, provided that he would thereafter represent himself pro se and that Walter W. Brooks, Esquire, may be associated (Tr. 41-42).

Thereafter, the Respondents, Tarr Investments, Sherbrook Associates, Leroy Strasburger and Alvin Strasburger timely served and filed an answer and counterclaim in both actions then pending (Numbers 1263 and 1315) (Tr. 4,33-37). In each case, the Respondents denied the

allegations of the complaints and set up twelve defenses, one of which was a counterclaim seeking damages for frustration of sale, slander of title and malicious interference with the Respondents' business (Tr. 33-37). The Respondents' answers further asserted the remedy of civil arrest and bail to protect and preserve their interests jeopardized by the actions taken or to be taken by the Petitioner (Tr. 36). The Petitioner pro se served and filed replies to the counterclaims in both actions (Tr. 38-39).

The third case included in the Petition presently before the Court (Number 1424) was commenced by service of a summons without complaint on

August 12, 1977, by the Petitioner pro se against the Respondent, United States Trust Company of New York (Tr. 4, 419). After service of a notice of appearance and demand for service of the complaint by counsel for United States Trust Company of New York, the Petitioner pro se served and filed his complaint on September 16, 1977 (Tr. 4, 419-422). On the same day the complaint was filed, the Petitioner pro se filed a notice of lis pendens describing real property which had been purchased by the Respondent United States Trust Company of New York as trustee from the Respondents Tarr Investments and Sherbrook Associates

(Tr. 421-422). Such filing was a direct violation of the oral and written orders of Judge Grimball (Tr. 2, 28-32,A. 35-41).

Throughout the proceedings in each of the three cases before the Court, the Petitioner was personally served with all pleadings (Tr. 5).

By a special order of Judge Grimball, served upon the Petitioner personally, all three cases included in the present Petition were set for trial before the Honorable Francis B. Nicholson, Circuit Judge, on January 17, 1978 (Tr. 5). At the call of the cases for trial, the Petitioner appeared personally and with counsel, Mr. Brooks (Tr. 5). Mr. Brooks intended to offer as the Petitioner's case, the transcript of testimony taken before Judge

Grimball on July 29, 1977 (Tr. 229). Although Judge Nicholson noted the advance arrangements and the work that had gone into bringing the present actions to trial, he found it necessary to disqualify himself because he realized that he had represented certain of the Respondents before he became a judge (Tr. 230).

By order dated January 31, 1978, Judge Grimball rescheduled the cases for trial on Monday, February 20, 1978 (Tr. 5, 45-46). Since February 20, 1978 was later discovered to be a legal holiday, Judge Grimball again rescheduled the trial for February 21, 1978 and the trial commenced on that date at 2:30 P. M. (Tr. 5, 46-47). At the call of the cases for trial before Judge Cobb,

the Petitioner appeared personally with Mr. Brooks and all Respondents were represented by their respective counsel (Tr. 5-6).

Before any testimony was taken, there was delivered to Judge Cobb a written motion signed only by the Petitioner pro se seeking to have Judge Cobb disqualify himself on the grounds of bias and prejudice (Tr. 6, 245-246, A.41). Judge Cobb then informed Mr. Brooks that the Petitioner could appear and address the Court either pro se or through counsel, but that he would not be permitted to proceed both pro se and through counsel (Tr. 246-247, A. 42). Mr. Brooks then brought to the Court's attention that he had never and did not

then represent the Petitioner in the action against United States Trust, in that the action against United States Trust was brought by the Petitioner exclusively (Tr. 247-248, A. 43). Judge Cobb then ruled that the motion requesting that he disqualify himself would not be considered unless it were signed by counsel (Tr. 248, A. 44). After this ruling, which has not been questioned in the Petition before this Court, and after conferring privately with the Petitioner at counsel table, Mr. Brooks moved to withdraw as counsel for the Petitioner and stated that he would advise the Petitioner from counsel table which he did for most of the trial proceedings on February 21, 1978 (Tr. 6, 248-249, A. 44-45). There being no objec-

tion by the Petitioner, Judge Cobb ordered that Mr. Brooks be granted leave to withdraw as counsel for the Petitioner and the Petitioner has not questioned that order in the appeal below or in his Petition (Tr. 6, 249, A. 45).

The Petitioner then moved that the cases be continued due to the withdrawal of Mr. Brooks as counsel. Counsel for all Respondents objected to a continuance and the motion was denied (Tr. 249-250, A. 21 of Petition).

The Petitioner then tendered to Judge Cobb the motion to disqualify himself, which, after considering the Petitioner's affidavit in support thereof, was denied (Tr. 251). (The Petition incorrectly states

that Judge Cobb refused to consider the motion. Petition at 4).

After the Court consolidated the cases for trial, the Petitioner moved for a voluntary nonsuit (Tr. 262-263, A. 23-24 of Petition). The Respondents objected and asked to move forward and have an affirmative ruling in the cases. (Tr. 263, A. 23 of Petition). The motion was denied (Tr. 263, A. 24 of Petition).

The Petitioner presented as his case the transcript of the proceedings before Judge Grimball on July 29, 1977, after which he rested his case (Tr. 264-266). The transcript was identical to that which Mr. Brooks had intended to offer on January 17, 1978 (Tr. 229). The Respondents moved for a nonsuit with prejudice, which motion was

denied by the Court (Tr. 266-267). The Respondents presented their cases, during most of which the Petitioner was assisted at counsel table by Mr. Brooks (Tr. 6-7). At the close of the presentation of the Respondents' testimony, the Court recessed for the day (Tr. 402).

Court was reconvened on February 22, 1978 and the Petitioner appeared personally with his present counsel, Irvine F. Belser, Jr., Esquire (Tr, 7, 409, A. 25 of Petition). Mr. Belser moved for a continuance of the trial until he could familiarize himself with the case (Tr. 409-412, A. 25-27 of Petition). Judge Cobb informed Mr. Belser that the case was at the reply stage and he denied the motion (Tr. 412, A. 27 of Petition). Mr.

Belser remained in the courtroom (Tr. 412).

The Petitioner again moved for a continuance, stating that he desired to subpoena certain witnesses who were not identified (Tr. 412-413, A. 27-28 of Petition). No subpoenas for witnesses were exhibited; no statement as to absence of any particular witness was made and no effort to present any witness occurred. Noting again that the case was at the reply stage, Judge Cobb denied the motion (Tr. 413, A. 28 of Petition).

At the close of all testimony, the Respondents requested that the Court take judicial notice of the cases of South Carolina Real Estate Commission v. R. Trippett Boineau, 267 S.C. 574, 230 S.E. 2d 440 (1976), cert. denied 431 U.S. 954

(1977), (wherein Petitioner's broker's license was revoked for false and fraudulent transactions) [1] and In the Matter of R. Trippett Boineau, 269 S.C. 189, 236 S.E. 2d 821 (1977) (wherein the resignation of the Petitioner as a member of the South Carolina Bar was accepted) (Tr. 416).

Judge Cobb then took the case under advisement. Judge Cobb issued his written order in all three cases on March 3, 1978 (Tr. 54-62, A. 14-20 of Petition).

The Petitioner has never indicated that he ceased to represent himself pro se in the matters before the Court (Tr.

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1 It may be of interest to note that the defense of the Petitioner was that he acted "on his own behalf" and not as a real estate broker.

9). The Petitioner has consistently appeared pro se throughout the proceedings in action numbers 1315 and 1424 (Tr. 9). Until his employment of present counsel after the trial of the cases, the Petitioner had no attorney other than himself in action numbers 1315 and 1424.

ARGUMENT

DID THE DENIAL OF THE PETITIONER'S MOTIONS BY THE TRIAL COURT FOR A CONTINUANCE, FOR A VOLUNTARY NONSUIT AND FOR A TEMPORARY RECESS CONSTITUTE A DENIAL OF DUE PROCESS OF LAW AND/OR EQUAL PROTECTION OF THE LAWS PROVIDED FOR IN THE CONSTITUTION OF THE UNITED STATES?

The primary issue (identical in #1263 and #1315 and incorporated in #1424) is whether a constructive trust should be impressed upon partnership property. The petitioner had been a partner in the real estate venture,

but became delinquent in his capital contributions and other obligations and conveyed all of his interest in the partnership. His option to re-acquire an interest was not exercised even though extended. He made no contributions thereafter and instituted suit some six years after he had transferred his partnership interest. No tender was ever made by petitioner. [2]

The Petition before the Court does not mention the fact that throughout the proceedings in the present cases, the Petitioner has consistently appeared

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2 The petitioner paid no part of the mortgages, expenses, interest, real property taxes, or development costs, which were indeed large (Tr. 336-345).

pro se and filed pleadings and papers pro se. Important in this regard is the fact that in two of the three cases, 1424 and 1315 (identical to the third case, 1263), there was no withdrawal of counsel. With regard to action number 1424, counsel appearing on behalf of the Petitioner at the call of the cases for trial, Walter W. Brooks, Esquire, stated prior to his withdrawal, "I did not have anything to do with U. S. Trust, now. That was brought by him [the Petitioner] exclusively." (Tr. 248, A. 43).

Various courts have dealt with the situation which arises when an individual appears on his own behalf in civil litigation. See, e.g., Sandlin v.

Pharoah, 182 Okl. 442, 78 P. 2d 284 (1938), Ackerman v. Southern Arizona Bank & Trust Co., 39 Ariz. 484, 7 P. 2d 944 (1932). The Petitioner in the present cases claims that surprise, unexpected events and/or inability to proceed with the actual trial of the cases dictated a continuance or recess of the trial. The Respondents submit, however, that since the Petitioner appeared as his own attorney throughout all proceedings in at least two of his three actions, he should be bound by all rules of court and enjoy rights no greater than those of any other litigant. Barnes v. United States, 241 F. 2d 252 (9th Cir. 1956). Murphy v. Citizens Bank of Clovis, 244 F. 2d 511

(10th Cir. 1957).

In the Petition, the Petitioner argues that he was forced to proceed to trial "without the aid of trial counsel." (Petition at 10). As one Court has pointed out, after a litigant elected to proceed to trial pro se:

> she could not expect or seek concessions because of her inexperience and lack of trial knowledge and training, since the court was bound to apply the rules of courtroom procedure equally binding on members and non-members of the bar. Mazique v. Mazique, 356 F. 2d 801 (D.C. Cir. 1966).

It is submitted that the consistent appearance pro se coupled with the fact that the Petitioner has a law degree supports the discretion which the trial

judge exercised in the present cases.

There is substantial authority which supports the proposition that, even in the absence of an appearance pro se by a litigant, the withdrawal of counsel in a civil action at the call of a case for trial does not require the granting of a motion for a continuance. See Annot., 48 A.L.R. 2d 1155 (1956). Furthermore, this rule of law has been held to satisfy the requirements of the United States Constitution. Ungar v. Sarafite, 376 U.S. 575 (1964), see also Avery v. Alabama, 308 U.S. 444 (1940).

The Ungar case involved a contempt proceeding wherein counsel for the accused party withdrew from representation of the accused after the trial court denied his motion for a continuance of the hearing. The appellant

in Ungar received prior notice of the hearing date, as did the Petitioner in the present cases. (Tr. 45-47). The denial in Ungar of the motion for adjournment was based upon the trial court's belief that the moving party had sufficient notice to employ counsel who would be available to proceed with the matter at the scheduled hearing. In the present cases, the order setting the time for the trial was issued approximately three weeks in advance of the hearing. (The order setting the trial for February 20, 1978 was signed January 31, 1978 and the order setting the trial for February 21, 1978 was signed February 10, 1978. Tr. 46-47). Of course this followed an earlier set time before Judge Nicholson.

In upholding the trial court's denial of the appellant's motion for a continuance, this Court noted that it was arguable that some judges may have granted a continuance under the circumstances. The Court further stated:

> [T]he fact that something is arguable does not make it unconstitutional. Given the deference necessarily due a state trial judge in regard to the denial or granting of continuances, we cannot say these denials denied [appellant] due process of law. Ungar v. Sarafite, 376 U.S. 575, 591 (1964).

In defining the standard used to determine the constitutional considerations in cases such as Ungar, the Court therein stated:

> The matter of a continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel...There are no

> mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

The attempt by the Petitioner to characterize the denial by the trial court of his motions for continuance and for a recess as a denial of constitutional guarantees of due process and equal protection completely ignores the complex history of the proceedings in the present cases. The trial judge knew the history. The record reveals two hearings before a Justice of the Supreme Court of South Carolina, not including the continuance before Judge Nicholson and the trial

before Judge Cobb on February 21 and 22, 1978 (Tr. 1, 3, 5, 348). The trial of the cases was set, special order, on three occasions (Tr. 5). Present counsel for the Petitioner is the fourth attorney to have appeared of record in the cases in addition to the Petitioner's uninterrupted appearances pro se (Tr. 1, 2, 8, 9). None of those four attorneys are from the same office. The Respondents submit that, applying the standards enunciated in Ungar, the Petitioner's constitutional rights to due process and equal protection of the laws were not violated by the trial court's denial of Petitioner's motions for a continuance and for a recess at the call of the cases for trial.

The same considerations relevant to

the denial of Petitioner's motions for a continuance and for a recess are applicable to his motion for voluntary nonsuit. The motion sought further delay, which in fact deprived Respondents of property rights. It is evident from a reading of South Carolina Circuit Court Rule 45 (A. 34-35 of Petition) and a reading of the record that the Petitioner was not entitled to a nonsuit as a matter of right at the time he requested it. Again, this denial was addressed to the sound discretion of the trial judge.

Many decisions of the South Carolina Supreme Court set forth the guidelines to be followed when questions regarding continuances and other procedural matters are addressed to (the discretion of) a trial

judge. See Harmon v. Harmon, 257 S.C. 154, 184 S.E. 2d 553 (1971), Timmons v. South Carolina Tricentennial Com'n., 254 S.C. 378, 175 S.E. 2d 805 (1970), cert. denied 400 U.S. 986 (1971), Romanus v. Biggs, 217 S.C. 77, 59 S.E. 2d 645 (1950), Barr v. Witsell, 173 S.C. 199, 175 S.E. 436 (1934), Armitage v. Seaboard Airline Ry. Co., 166 S.C. 21, 164 S.E. 169 (1932), Brunson v. Hamilton Ridge Lumber Corp., 122 S.C. 436, 115 S.E. 624 (1923), Pee Dee River Lumber Co. v. Fountain, 90 S.C. 122, 72 S.E. 885 (1911), Edens v. Epps, 87 S.C. 367, 69 S.E. 669 (1910), Inman v. Hodges, 80 S.C. 455, 61 S.E. 958 (1908). The Federal Courts have also spoken in terms of exercising sound judicial dis-

cretion. See, e.g., Krodel v. Houghtaling, 468 F. 2d 887 (4th Cir. 1972), cert. denied, 414 U.S. 829 (1973).

This Court exercises discretion. Judicial discretion is a standard "... the exercise of which will ordinarily not be reviewed." Avery v. Alabama, 308 U.S. 444, 446 (1940). The Petitioner in the present cases requests that discretion be defined in constitutional terms of due process of law and equal protection of the laws. Such a definition is not warranted by the facts of the cases before the Court.

CONCLUSION

The Petitioner chose not to be represented by counsel in the cases before the

Court, ab initio, These cases are not a basis for any type of relief or precedent. For all of the above reasons your Respondents respectfully pray that this Honorable Court issue an Order denying the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

ORDER OF THE HONORABLE JOHN GRIMBALL, CIRCUIT JUDGE

This matter comes before me on motion of counsel for the defendants to strike the lis pendens filed by the plaintiff in the above entitled action on July 22, 1977. This court issued its order on July 22, 1977 in the case of William H. Moore, Jr., Plaintiff, vs. Sherbrook Associates, et al, Defendants, directing the Clerk of Court of Richland County to strike any lis pendens heretofore or hereafter filed against the properties of Leroy Strasburter and/or Alvin Strasburger and/or Tarr Investments and/or Sherbrook Associates by R. Trippett Boineau. Testimony was taken before me during the hearing on July 22, 1977 after due and personal service upon R. Trippett Boineau of the notice of motion and order setting forth the time, date and place of hearing. There was no appearance made by or on behalf of R. Trippett Boineau at the July 22, 1977 hearing. It appears that since the signing of the order of July 22, 1977, R. Trippett Boineau pro se and by counsel has filed two (2) additional lis pendens against the same properties, one being filed in the afternoon of July 22, 1977 and one being filed on July 27, 1977.

Accompanying the lis pendens filed on July 22, 1977 by R. Trippett Boineau, pro se, was accompanied by [sic] a summons and complaint identical to that served by Kermit S. King, Esquire.

At the time of the hearing on the present motion before the court on July 29, 1977, Mr. King withdrew as counsel for the plaintiff and asked that the lis pendens previously filed by him be stricken and the summons and complaint in this action be dismissed. Appearing at the hearing on July 29, 1977 as counsel for and on behalf of R. Trippett Boineau were Frank L. Taylor, Jr., Esquire, and Walter S. Brooks, Esquire. Mr. Boineau also appeared in person. R. Trippett Boineau was adequately represented by counsel at the hearing on the motion now before the court. Mr. King's request that the case be dismissed is denied and this court substitutes Mr. Taylor and Mr. Brooks as counsel for the plaintiff in this action. It further appears that the summons and complaint signed by R. Trippett Boineau, pro se, is identical to the suit served and filed by Mr. King. The pleadings served and filed by Mr. King shall constitute the pleadings before me and Mr. Taylor and Mr. Brooks shall constitute the counsel for Mr. Boineau in that suit.

This court has carefully considered the testimony offered on behalf of the

parties to this suit and it appears that valuable tracts of real estate are involved and the encumbrances upon such tracts are large. It further appears from the testimony that a portion of this property is to be sold to United States Trust Company of New York as Trustee to prevent the foreclosure of various mortgages held on the entire tract of land listed in the lis pendens filed by the Plaintiff. This court finds that the filing of a lis pendens against the property subject to the above mentioned sale will chill and frustrate said sale and will ultimately result in irreparable loss to the defendants herein and to any claim, if any, the plaintiff may have in partnership assets. This court further finds that it is to the benefit of the plaintiff and the defendants if the abovementioned sale is consummated and the funds derived therefrom disbursed immediately.

Three (3) foreclosure actions against properties held by the defendants and presently pending before this court will be dismissed if the sale of an unencumbered portion of the properties which are the subject of the lis pendens filed by the plaintiff is completed.

The order of this court of July 22, 1977 was filed at 12:04 P. M. on that

date and on July 22, 1977 at 12:07 P. M. Tarr Investments and Sherbrook Associates deeded some real properties to United States Trust Company of New York as Trustee, which is recorded in the office of the Registor [sic] of Mesne Conveyances for Richland County in Deed Book D-430 at page 381. I find and hold that said conveyance of record in the office of the Register of Mesne Conveyances of Richland County in Deed Book D-430 at page 381 was free and clear of any claim of this plaintiff R. Trippett Boineau and not subject to any lis pendens filed by or for R. Trippett Boineau. Furthermore, I find that R. Trippett Boineau himself cancelled the lis pendens against the subject properties and as of 12:07 P. M. on July 22, 1977 there was no lis pendens filed against any of the properties described in the deed to United States Trust Company of New York as Trustee.

Reference is herewith made to the order of this court of July 22, 1977 and the testimony then taken and the testimony taken on July 29, 1977, I find that the equity powers of the court under the evidence presented permits the dismissal of the lis pendens filed by the plaintiff against the portion of the properties therein listed which are the subject of the sale to the United States Trust Company of New York, as Trustee, said properties being itemized, set forth and

described more fully in the Exhibit marked "A" attached hereto, and herewith incorporated for the purpose of identifying the real properties in question. Accordingly,

IT IS ORDERED that R. Trippett Boineau be and he hereby is restrained from filing or procuring or authorizing or directing any further or additional filing of any lis pendens in this action or any other action as it pertains to the real properties of Tarr Investments and/or Sherbrook Associates and/or Leroy Strasburger and/or Alvin Strasburger itemized, set forth and described in the Exhibit marked "A" attached hereto and herewith incorporated by reference for the purpose of identifying the real properties in question, or employing any person to file such a lis pendens pending the further order of this court and pending the filing of a good and sufficient bond conditioned upon the payment of any and all losses and damages, including attorney fees, sustained by these defendants as a result of such filing, the amount of which bond shall hereafter be set by this court upon application of any party. And

IT IS FURTHER ORDERED that the lis pendens filed for the plaintiff in the above captioned case on July 22, 1977 and the lis pendens filed by the plaintiff

in the above captioned case on July 27, 1977 and any other lis pendens filed by or for the plaintiff against the properties itemized, set forth and described in the Exhibit marked "A" and attached hereto and herewith incorporated by reference for the purpose of identifying the real properties in question, are hereby cancelled and stricken and the Clerk of this Court is hereby directed to strike the same of record and to strike any other lis pendens, if any there be, now filed or hereafter filed by or for this plaintiff against the properties described in the attached Exhibit "A", which is herewith incorporated for the purpose of identifying the properties in question.

IT IS FURTHER ORDERED that the defendant deposit from the proceeds of the sale to United States Trust Company of New York as Trustee the sum of Fifty Thousand ($50,000.00) Dollars in escrow with a building and loan association, savings and loan, institution or bank in the form of cash, stocks or bonds in the name of the defendants. Any interest which accrues on the escrow until the conclusion of the present suit and such principal and interest shall remain the property of the defendants until further order of this court.

AND IT IS SO ORDERED.

/S/ John Grimball
Resident Judge, Fifth
Judicial Circuit

Columbia, South Carolina

August 8th, 1977

EXCERPT FROM TRANSCRIPT OF RECORD

Transcript 245-249

Mr. Brooks: ... The last thing I want to bring before the court is that Mr. Boineau has signed this pro se, and I have given it to counsel, a motion asking you to disqualify yourself. That is also based on an order you formerly issued on the matter of Hare versus--I think it is a 500 Gervais Street partnership, which Mr. Boineau was also a party in.

THE COURT: Are you appearing as attorney for Mr. Boineau in all these cases?

MR. BROOKS: I am at this time, yes, but he is--one of them he appears pro se. Your Honor, as McCuchen [sic] mentioned, there has been a joinder there of two--by Moore versus Tarr Investments,

one of them he brought pro se, one Kermit King brought in his behalf, and later withdrew. I think he and Frank Taylor brought it together. They later withdrew.

I later became involved. That is two of them. The other one Mr. Boineau brought himself.

THE COURT: That is really what I was asking. The one Mr. Boineau brought himself or represents himself, are you representing him now in that matter or is he still representing himself?

MR.BROOKS: Your Honor, I think it would be safe to say that Mr. Boineau represents himself in both of these matters and at this juncture I represent him in both of these matters also.

THE COURT; You can't have it both ways. Mr. Boineau will either have to appear representing himself or with you as attorney.

MR. BROOKS: Well, your Honor, I don't have anything to question the court's ruling on that. I don't think I agree with you because I have seen it happen too many times, especially in General Sessions Court, where someone appears pro se and the court appoints

somebody, someone to represent them and protect their interests, and the matter goes on--

THE COURT: You can't do it in General Sessions Court.

MR. BROOKS: I wish I could give the authority on that because I have something--

THE COURT; A case came down about a month or two ago. You can have counsel sitting at the table to advise a defendant in the case, but he cannot speak to the court. I just want to know who is speaking for whom.

MR. BROOKS: At this juncture I am speaking for Mr. Boineau. He signed that motion pro se, and I guess for the sake of clarity and moving forward I will have to argue it for him, seeing that I am here. I couldn't now say I am going to leave and be fair to the court or to opposing counsel.

THE COURT; All right, sir. Then I am going to put in the record that you are appearing as his attorney in all three cases.

MR. BROOKS: Yes, sir, at this juncture--no, Your Honor. I did not have anything to do with US Trust, now. That was brought by him exclusively.

THE COURT: Then all cases except US Trust.

MR. BROOKS: Yes, sir, and Boineau versus Tarr-of course Mr. Boineau will have to speak for himself, but I have already spoke this morning that he does not agree to a joinder of that particular lawsuit or these two lawsuits.

THE COURT: Well, in this motion that you hand up to me, signed by Mr. Boineau, pertains to the two cases wherein you are his attorney?

MR. BROOKS: Up until this moment when you declared he couldn't have it both ways, I was of the opinion that he could. So, it is being handed up in his position as representing himself, as well as me representing-- As Your Honor is well aware, up until a short time ago Mr. Boineau was a member of the Bar and could have stood here as cocounsel, if he wanted to, and this is what has caused some dilemma here.

THE COURT: Well, for me to consider this motion, you will have to sign it.

MR. BROOKS: Your Honor, I will have to withdraw as counsel.

THE COURT: All right. You make a motion at this time to be relieved as counsel?

MR. BROOKS: Yes, sir.

THE COURT: Sir?

MR. BROOKS: From everything--I am going to have to advise him from behind the seat, but I am not going to be counsel any more.

Your Honor, I am making a motion in open court to be relieved as counsel. I think that Mr. Boineau will have to move forward himself. I will have to sit here and advise him, but I would not address the court any more.

THE COURT: I will grant the motion. It is so ordered.

In compliance with Paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have served the required copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari on Irvine F. Belser, Jr., Esquire, Attorney for the Petitioner, by depositing the same in the United States Post Office on the 3rd day of October, 1979, with first class postage prepaid, addressed to said Attorney for Petitioner at Post Office Drawer 12014, Columbia, S. C. 29211.

Thomas E. McCutchen

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